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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO LOCAL 790,
Petitioner
v.
ROBBINS & MYERS, INC.

DORTHA ALLEN GUY,
Petitioner
v.
ROBBINS & MYERS, INC.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

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INTEREST OF THE *AMICUS CURIAE*

Pursuant to Rule 42(2) of the Rules of Court, all parties to the case have consented in writing to the filing of this brief and participation of the Equal Employment Advisory Council (hereinafter referred to as EEAC) as *amicus* in this case. EEAC is a voluntary, non-profit association, organized as a corporation under the laws of the District of Columbia. Its membership includes a broad spectrum of employers, both organized and unorganized, from throughout the United States, and including individual employers as well as trade and industry associations.

The principal goal of the EEAC is to represent and promote the common interest of employers and the general public in the development and implementation of sound government policies, procedures, and requirements pertaining to nondiscriminatory employment practices. A substantial number of EEAC's members, or their constituents, have collective bargaining agreements covering hundreds of thousands of employees throughout the country including substantial numbers of persons who are otherwise protected under Title VII of the Civil Rights Act. As such, the members of EEAC have a direct interest in the issues presented for the Court's consideration in this case, both as to the retrospective application of the 1972 amendments and the request for permitting the tolling of the time limits for the filing of discrimination claims with the Equal Employment Opportunity Commission by the mere filing of a grievance under a collective bargaining agreement.

EEAC urges the Court to bring about greater stability in the procedures to be followed under Title VII so that persons affected thereunder, whether they

be complainant or respondent, will know with certainty what the law requires of them in the protection of their rights.

STATEMENT OF THE CASE

The facts as set forth in the briefs of the parties to this case are sufficient for the *amicus* to present its position as a friend of the Court on the appeal. Several key points, however, should be fully stressed. Petitioner Guy's claim of discrimination, on the merits, was found wanting by the Equal Employment Opportunity Commission, which investigated it fully, and found no cause for discrimination notwithstanding its untimeliness. Unlike her grievance which failed to allege discriminatory treatment, she charged the Company for the first time with discrimination on grounds of race and sex before the EEOC.

Further Petitioner Guy was a union steward and even though a grievance was filed over the alleged "unfair action" of the Company, it was *not* taken further to an impartial arbitrator by the Petitioner IUE herein after being denied at the top step of the grievance procedure before arbitration. No claim is made that she was unaware prior to the expiration of the filing period with the EEOC that the union had abandoned her cause. Her subsequent court action initially sued the Union for breach of the duty of fair representation.

SUMMARY OF ARGUMENT

This case is before the Court as a result of the interaction of several earlier decisions that afford Petitioner an opportunity to endeavor to maintain an action in the Federal courts even though she has failed to comply with the Title VII statutory juris-

dictional time limits for filing charges with the Equal Employment Opportunity Commission expressly recognized by this Court on three separate occasions since 1973.

Perhaps aware that these rulings are fatal to her contention, Petitioner initially argues that the 1972 amendments to Title VII should be construed in a retrospective manner so as to revive her untimely filed claim which had previously been extinguished by operation of law. The legislative history of the amendments fail to support her contention that Congress intended to resurrect such barred claims. The text of a Justice Department letter referred to on the floor of Congress and published as Special Appendix A to this brief is conclusive evidence that the sole reason Congress made the amendments to Section 706 applicable to charges pending before the agency was to protect the Commission's newly conferred authority to bring suit on otherwise valid matters then being processed at the agency on an administrative basis. Admittedly Congress could have been more precise in its draftsmanship but what the Petitioner claims was intended is contrary to the facts. This is particularly so in light of the Justice Department letter which apparently was not considered in its original form by the Ninth Circuit in *Davis* v. *Valley Distributing Co.*, 522 F.2d 827, 10 FEP Cases 1473 (1975), a case extensively relied upon by the Petitioner and in which a petition for certiorari has been pending in this Court since December 13, 1975. (Docket No. 75-836).

Petitioner's alternative argument to by-pass the statutory time limits is designed to ensnare the Court into substituting for the clear and easily administered statutory guideline in Section 706, a totally amorphous set of jurisdictional limitations that lack any uniformity and will embroil both the Commission and the Federal courts in a wide number of cases over miniscule determinations of when an individual's right accrues to file with the Commission. Petitioner's proposal, that the filing of a grievance under a collective bargaining agreement tolls the jurisdictional time limits in the Act, must fail under the Court's unanimous holding in *Alexander* v. *Gardner-Denver*, 415 U.S. 36, 7 FEP Cases 81 (1974), which essentially severed a connection that several of courts of appeals believed had existed between Title VII suits and the procedures for the resolution of disputes under collective bargaining agreements. *Alexander* is an insurmountable hurdle to the Petitioner's case here as the Court there, recognized Title VII as creating remedies totally independent and apart from the grievance-arbitration machinery of collective bargaining contracts. The Petitioner's argument here depends entirely upon a theory that was rejected in its broadest form by the Court two and a half years ago. Petitioner's effort cannot succeed unless this Court is prepared to substantially modify its *Alexander* rationale.

The suggestion that the tolling period be determined by the terminal point of grievance-arbitration procedures in individual collective bargaining contracts is an impractical idea which would encourage countless disputes. Thus, on its own merits, the Petitioner's tolling proposal should be rejected by the Court because it is unsound and will increase—not decrease—the amount of litigation both before the

Commission and the courts arising out of Title VII procedures.

Further, such tolling would be available only to employees under collective bargaining agreements thus giving them a right not shared by three-fourths of the nation's work force. The Court is urged to reject Petitioner's proposal as inherently discriminatory and unnecessary to protect Title VII rights in view of the expansion of the statutory jurisdictional time limits for filing with the Commission under the 1972 amendments. This enlarged time frame provides ample opportunity for aggrieved persons to decide if they wish to press charges of discrimination against respondents.

Finally, the decision in *Johnson* v. *Railway Express*, 421 U.S. 454, 10 FEP Cases 817 (1975), which followed *Alexander*, further undercuts Petitioner's suggestion that tolling be looked upon with favor by this Court. The rationale of the *Johnson* case applies with equal force to her arguments here. Accordingly, a decision by this Court affirming the Court of Appeals below would be a logical extension of the Court's thinking as expressed in *Alexander* and *Johnson*. It is for these reasons that Petitioner must fail here in an effort to have the Court rather than Congress amend Title VII.

ARGUMENT

I. The Petitioners' Claim Had Been Extinguished Before The Effective Date Of the 1972 Amendments and Congress Did Not Intend to Revive It.

Although it is not entirely clear whether the issue of the retrospective effect of the 1972 amendments to

Title VII is squarely before the Court,[1] EEAC believes there are compelling reasons, on the merits, why the Court should overrule the arguments propounded for resurrecting the barred claim of the Petitioner, which previously had been extinguished when it was not timely filed with the Commission.

These arguments, the most strenuous of which has been advanced by the United States as *amicus curiae* are plainly based on an erroneous conclusion as to the intent of Congress. It is clear that the Congress, in changing the wording of Section 14 of the amending legislation, was responding to a concern that had no relationship to the time limits for filing a charge with the EEOC, the issue which is at the heart of this appeal. Its reason for providing that the Section 706 amendments would be applicable to "all charges pending before the Commission" was grounded upon anticipation of legal challenges to the exercise of the Commission's newly entrusted authority to bring suit in the Federal Courts. This source of power, long desired by the Agency but denied to it in the original legislation in 1964, was one of the major changes wrought by the 1972 amendments. The concern involved attempts to limit suits brought by the Commission only to charges filed with the Commission *after* the effective date of the amendments. With thousands of *valid* charges pending before the Commission in varying stages of the investi-

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[1] From a reading of the briefs there appears to be a sharp dispute between the parties to the case as to the appropriateness of this issue on appeal in view of some conflicting events below. The *amicus* leaves the argument to them and instead directs its comments to the broader issues.

gatory and conciliatory processes, the absence of the additional language in Section 14 would have permitted an arguable impediment to the power of the Commission to later bring suit on them. The sole intent of Congress was to confirm the Commission's power to sue in such instances. The proof of such intent is to be found in an overview of the legislative history surrounding its existence in the Act.

The most often cited excerpt from the legislative history in support of construing the amendments retrospectively is found in the waning moments of the Senate debate on February 21, 1972, when Senator Javits of New York offered an amendment to change the previously suggested wording of Section 14.[2] The reason for the proposal was plainly stated by the Senator:

> "MR. JAVITS. Mr. President, this amendment would make whatever we do enact into law applicable to pending cases. The Department of Justice has requested it in a letter to the minority leader; that is my reason for offering it." 118 Cong. Rec. 4816 (1972)

The letter sent by the Justice Department to the minority floor leader on the bill, Senator Peter Dominic of Colorado, is reproduced in full as Special Appendix A to this brief. A reading of the third paragraph (the part most relevant to this appeal) con-

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[2] Originally, Section 10 in H.R. 1746 prior to such alteration read as follows:

Section 10, H.R. 1746: Sections 706 and 710 of the Civil Rights Act of 1964, as amended by this Act, shall not be applicable to charges filed with the Commission prior to the effective date of this Act.

firms that the sole concern leading to Senator Javits' retroactivity proposal was over the newly conferred authority of the Commission to sue directly in the Federal Courts. The Ninth Circuit in *Davis* v. *Valley Distributing Co.*[3] concurs in this interpretation:

> "Section 14 was adopted primarily to make the new authority given EEOC to bring suit against alleged violators applicable to pending claims." *Supra*, 522 F.2d at 831, 10 FEP Cases 1474.

This much is clear and fairly finds support in the legislative history. Had the *Davis* case involved the right of the Commission to bring suit on a pre-amendment claim, otherwise validly before the Commission on the date the amendments took effect, there could be little persuasive argument to the contrary.

But the Ninth Circuit went further by concluding that subsequent floor comments on the *entire* set of amendments evidenced an intention to revive any claims of discrimination that were previously barred by operation of law. We submit that the *Davis* court over-reached in the absence of more *specific* legislative history than at hand here.[4]

The question is raised by Petitioners as to the meaning of the word "pending" and whether it could

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[3] 522 F.2d 827, 10 FEP Cases 1473 (1975), Petition for Cert. filed December 13, 1975, Docket No. 75-836 and now pending before this Court.

[4] It does not appear that the text of the letter was before the *Davis* court which was not sure of its own conclusion: "But the question is one of legislative intent; and though not free from doubt, we think it the *more* likely conclusion . . . ." *Supra*, 522 F.2d at 830. Upon reflection the *Davis* court might have ruled otherwise after reading the Justice Department letter.

be rationally applied to charges that were never validly filed with the Commission because of non-compliance with the 90-day statute of limitations in Section 706(d). Webster's New International Dictionary defines pending as "awaiting conclusion".[5] But charges barred by operation of law cannot be waiting resolution. Rather they have been disposed of for the law has done that automatically and thus they do not fall within the literal meaning of the word. In the floor discussion on Senator Javits' proposal, Senator Ervin (D-N.Car.) lends strength to this conclusion:

> "MR. ERVIN: In other words, it is just to *keep* pending charges alive, and to make them subject to the amendment to the original Act?" *supra* at 118 Cong. Rec. 4816 (1972) (emphasis supplied).

Senator Javits responded affirmatively. It is thus clear under the plain usage of these words that charges which were already dead could not be "kept" alive and that those that were pending were viable and not barred. Nothing is even remotely hinted at to evidence an intention to resurrect previously time-barred charges whether still in the Agency files or not.

The decisions of this Court have consistently given effect to federal periods of limitation. The running

[5] Webster's New International Dictionary of the English language (1925) at p. 1595. Cf. Black's Law Dictionary (1968 ed.) which defines pending as "begun, but not yet completed". p. 1291. Since Petitioner Guy's claim had already been aborted when it was not timely filed there was, in the contemplation of the law, nothing to begin to investigate or process through the Agency's machinery.

of the period of limitation "not only bars the remedy, but destroys the liability". *A. J. Phillips Co.* v. *Grand Trunk Western Ry. Co.*, 236 U.S. 662, 667 (1914). As Justice Jackson noted: "The course of action, the very foundation for relief, is extinguished." *Midstate Co.* v. *Pennsylvania Railroad Co.*, 320 U.S. 356, 364 (1943).

Petitioners and the United States, however, suggest to the Court that it infer, in the absence of any evidence, that the Congress intended to revive barred claims under Title VII. For this Court to override the specific period of limitation, EEAC submits there must be compelling proof to support such a drastic construction. The issue is not only whether Congress had the power to revive barred claims under Title VII, but whether it actually intended its legislative enactments in 1972 to have such an impact.[6]

The *amicus* believes it is clear from the legislative history that it was not the intent of Congress to make the limitations period contained in the new Section 706(e) retroactive. Even if it were otherwise, however, the retroactive effect could not constitutionally act to revive Petitioner Guy's time-barred claim. *William Danzer and Co.* v. *Gulf & Ship Island R. Co.*, 268 U.S. 633 (1925).

The Petitioner suggests to the Court that on the basis of *Chase Securities Corp.* v. *Donaldson*, *supra*,

[6] Thus, *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304 (1945), and other cases, heavily relied upon by the Petitioners, are not dispositive of the matter, for as the Court observed in *American Pipe and Construction Co.*, 414 U.S. 538, 557-8 (1974), the test is whether the impact is true to the "legislative scheme."

such legislation would be constitutional. *Chase*, however, is not controlling. There the court distinguished the legality of extending a limitations period contained in a statute which itself did not create the liability (as in *Chase*), from the unconstitutionality of extending an expired limitations period contained in a statute which itself creates the liability as in the instant case. 325 U.S. 312 n.8. This very distinction was recognized by the *Chase* opinion:

> "In the *Danzer* case, it was held that where a statute in creating a liability also put a period on its existence, a retroactive extension of the period after its expiration amounted to the taking of property without due process of law." *supra*, at 325 U.S. 312 n. 8.

Thus, contrary to Petitioners contention, once the 90-day limitation period under Section 706(d) had expired, regardless of whether Ms. Guy filed on February 10, 1972 or April 2, 1972 (after the new amendments went into effect), her claim was forever barred and the Congress could not constitutionally revive it.[7]

Further, this Court has generally been reluctant to fill in statutory gaps without a more definitive indication from the Congress. The only clear conclusion that can be made here deals with the Commission's powers of suit being applicable to pending valid claims at the Agency. The *amicus* submits that something more than vague references in conference reports and limited floor discussion is required to overcome the sharply delineated 90-day statutory time limit in the old section 706(d). If Congress wanted to revive barred claims, it could have plainly said so. It is clear, however, that it was concerned with another and totally different problem when it accepted Senator Javits' change in Section 14.

[7] This concept is not of recent origin and has a long historic basis. See Annotation to *Townsend* v. *Jemison*, 50 U.S. 407, 9 HOW 407 (1850) at 13 L.Ed. 194.

The United States, as *amicus curiae*, argues that "the Court should interpret Section (14) as applying to all charges *that were being processed* by the EEOC on March 24, 1972, whether or not the charges were timely filed under the previous limitations, if EEOC wanted to investigate them. If Section 14 was to be *that* broad, the Congress should have so indicated that it was giving the EEOC such authority.

The *amicus* EEAC strongly opposes giving retroactive effect to the 1972 amendments, because it is impossible to tell how many untimely charges are still buried in the Commission's backlog of charges with no statutory time limit for the bringing of suit by a charging party so long as their charge is still in Agency hands. The Commission has been unable to cope with its substantial backlog of charges and the number of pre-1972 ones still at the Agency is unknown.[8] Thus employers might yet under a retroactive holding have to face defending years-old matters.

[8] Augustus Hawkins (D-Calif.), Chairman of the House Labor Sub-Committee on Equal Opportunities, noted at the recent oversight hearings in May 1976 that the Commission has a backlog of over 120,000 cases and that some charges have been pending for as long as seven years. Labor Relations Reporter, Bureau of National Affairs, 92 LRR 66 (May 24, 1976).

Petitioner also contends that Guy is being penalized for having "filed too soon"; that had she not filed until *after* the effective date of the amendments, the filing would have been timely. The answer is not difficult. Congress intended to enlarge the period for filing of *new* claims of discrimination that arose after March 24, 1972. Any claims that arose out of acts of discrimination that occurred earlier were subject to the *old* period of limitation. This is a rule of common sense and one which is easily capable of administration by the Commission and the courts.[9] The short reply to the much advanced argument of "double filing" is that even if Ms. Guy had filed *after* the March 24, 1972 date, her claim would still be measured against the period of limitations which prevailed at the time the alleged act of discrimination she charges took place, which was before the effective date of the amendments.[10]

Finally much has been made by Petitioners of the Court's recent decision in *Brown* v. *GSA*, —— U.S. ——, 12 FEP Cases 1361 (1976). While the Second Circuit in *Brown* v. *GSA*, 507 F.2d 1300, 8 FEP Cases 1299 (1974) discussed the issue of retrospective application of the 1972 amendments, this Court did not offer its own comments. It is thus difficult to characterize the Court's position, at best exercised *sub silento*, and the matter frankly is not free from doubt. On the merits, the Court strictly applied the

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[9] For historical authority supporting this rule see the Annotation to *Townsend* v. *Jemison, supra.*

[10] This case thus falls within the exception of contrary legislative history alluded to in *Bradley* v. *School Board of the City of Richmond*, 416 U.S. 696 (1974).

rule of limitation and upheld the dismissal of Plaintiff Brown's case because he had not filed suit within thirty (30) days of the final action of his agency as required by Section 717(c) of the Act. Most important, however, is the fact that Brown's initial filing at the administrative level was itself timely.

The EEAC urges the Court here to hold that the 1972 amendments were not applicable to Petitioner Guy's claim lodged with the Commission. Unless the 90-day statute of limitations was tolled on some other ground, her claim was extinguished, as a matter of law, before she contacted the Commission on February 10, 1972.

II. The Court's decision in Gardner-Denver has effectively barred any tolling of the jurisdictional limitations in Title VII of the Civil Rights Act.

A. *The Court emancipated Title VII from collective bargaining contract grievance procedures including arbitration.*

EEAC believes the national labor policy should endeavor to accommodate arbitration and Title VII based upon a substantial rule of district court deferral to arbitration awards similar to that urged upon the court by the *amicus curiae* Chamber of Commerce of the United States of America in *Alexander* v. *Gardner-Denver, supra.* Much is to be said, from the viewpoint of stabilizing labor relations in this country, to warrant reconsideration of this matter at some future time. In *Alexander*, however, this court left no doubt that it viewed the rights created by Congress under Title VII to be separate, independent and un-

fettered by the collective bargaining process or any contracts arrived at through such a forum. The federal courts, according to the opinion, "have been assigned plenary powers to secure compliance with Title VII." *Supra* 415 U.S. at 45, 7 FEP Cases 84. In view of the *Alexander* decision, therefore, Petitioners tolling argument cannot be accepted by the Court.

While recognizing that an employee could be heard in the dual forums of arbitration and the Federal courts, the Court in *Alexander* was careful to point out that they were not interfaced and that the rights in each forum "have legally independent origins and are equally available to the aggrieved employee." *Supra*, 415 U.S. at 52. Any substantial connection was cleanly severed with this incisive comment:

> "But in instituting an action under Title VII, the employee is not seeking review of the arbitrator's decision. *Rather he is asserting a statutory right independent of the arbitration process.*" *Supra*, 415 U.S. at 54, 7 FEP Cases 88. (Emphasis supplied).

Yet despite the plain meaning of this basic observation, the Petitioners here persist in arguing that there is a direct link between the two forums and that resort to one is deferred while recourse is had to the other. Nothing in *Alexander* even begins to suggest approval of tolling or recognition of the dependency relationship urged by Petitioners on the Court here.

Strong evidence against the Petitioner's contentions is found in the Court's attitude toward the arbitration process. Every argument raised by the Petitioners as to the desirability of arbitration was expressly and unanimously rejected in *Alexander* which

the Court characterized as a "less appropriate" forum for the resolution of Title VII issues than the federal courts. One commentator in the labor law field has recently observed "the golden age of arbitration is already over".[11]

The Petitioner IUE overlooks the Court's disenchantment with collective bargaining dispute settlement procedures as being adequate to protect the rights of aggrieved persons under Title VII.[12] For this Court now to hold that the mere filing of a grievance under a collective bargaining agreement automatically tolls the running of the period of limitation for the filing of a charge with the EEOC, it must substantially retreat from its unanimous decision in the *Alexander* case where it stated that "the legislative history of Title VII manifests a Congressional intent to allow an individual to pursue *independently* his rights under both Title VII and other applicable state and federal statutes". *Supra*, 415 U.S. at 48, 7 FEP Cases 85.

The arguments of Petitioners that the Court's decision in the *Alexander* case lends support to their position on the tolling issue here are based upon a strained reading. The entire tone of the Court's opin-

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[11] David E. Feller, address before National Academy of Arbitrators, May, 1976, reported in Labor Relations Reporter, 92 LRR 70 (May 24, 1976).

[12] See Footnote 19, *Alexander* v. *Gardner-Denver*, *supra*, As previously noted, although a Union steward, Petitioner Guy originally charged the IUE here with failing to represent her in good faith, giving some support to the Court's observation in the footnote that there may be conflicting interests which militate against the use of contractual procedures to resolve Title VII complaints.

ion in *Alexander* is one of giving full and unencumbered standing to the remedies created by Congress under Title VII. In fact, the Court has already rejected the foundation of the arguments for tolling advanced by the Petitioners:

> "Title VII does not speak expressly to the relationship between the federal courts and the grievance-arbitration machinery of collective bargaining agreements. It does, however, vest federal courts with plenary powers to enforce the statutory requirements and it specifies *with precision* the jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit." *Supra*, 415 U.S. at 47, 7 FEP Cases 85. (Emphasis supplied.)

The Court then directly follows the above sentence by listing such prerequisites with the first being the *timely* filing of a charge with the Commission.[13]

Petitioners rely most extensively on the pre-*Alexander* decisions of the Fifth, Seventh and Ninth Circuits holding that the filing of grievances in each case tolled the running of the statute of limitations under Title VII.[14] Aside from the obvious fact that

[13] The Court also cited its earlier decision in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 5 FEP Cases 965 (1973) which had referred to such timely filing as a jurisdictional requirement under the Act. A similar reference appears in *Johnson* v. *Railway Express Agency, Inc., supra*, making it the third occasion in the last three years that the Court has so held.

[14] *Culpepper* v. *Reynolds Metals Co.*, (C.A. 5) 421 F.2d 888, 2 FEP Cases 397 (1970); *Hutchings* v. *U.S. Industries, Inc.*, (C.A. 5) 428 F.2d 303 (1970), 2 FEP Cases 725; *Malone* v. *North American Rockwell*, (C.A. 9) 457 F.2d 779, 4 FEP Cases 544 (March 23, 1972); *Moore* v. *Sunbeam Corp.*, (C.A. 7) 459 F.2d 811, 4 FEP Cases 454 (1972).

they were also decided before the 1972 amendments became effective, they all are based upon an assumption that a strong degree of integration existed between the collective bargaining process and Title VII. Without belaboring the point, which is fully covered in the Respondent's brief to the Court, it should be readily apparent that the holdings in these cases are open to serious question in light of *Alexander* v. *Gardner-Denver*, *supra*.

While it is patently clear that this Court in the *Alexander* case firmly and effectively severed grievance-arbitration procedures from Title VII remedies,[15] the Petitioners nevertheless attempt to again establish a connection between the two that inevitably fails—and for good, practical reasons. About one fourth of persons employed in the Nation's work force are covered by collective bargaining agreements.[16] Thus acceptance of tolling, as urged by Petitioner, will create a special rule inapplicable to three out of every four workers in this country and at variance with the national labor policy.[17] This com-

[15] The Petitioners' allusion to footnote 21 relating to the almost casual treatment of arbitrators' decisions in the district courts does little to narrow the width of the separation.

[16] *Handbook of Labor Statistics 1975—Reference Edition*, U.S. Department of Labor Bureau of Labor Statistics, p. 389 (In 1972, only 26.7% of the labor force were union members).

[17] This problem is aptly illustrated in *McDonald* v. *Santa Fe Transportation Co.*, —— U.S. ——, 12 FEP Cases 1569 (1976). Petitioner McDonald was a union member and had a grievance filed on his behalf. Petitioner Laird, the other white person terminated, was a supervisor and outside the bargaining unit covered by the collective bargaining unit. Thus, although both men were fired as a result of the same

ment applies equally to persons who, although not covered by the National Labor Relations Act, such as supervisors, managers, and guards, nevertheless fall within the protective umbrella of Title VII.[18] Thus, a rule of tolling would discriminate against the vast majority of the Nation's work force and create a special privilege for about one quarter of those employed. This result is directly contrary to the objectives of Title VII to end discriminatory treatment and achieve equality of opportunity. It is ironic that Petitioners appear before this Court urging adoption of a rule that would be inherently discriminatory. We believe the commitment of this Court to Title VII necessitates rejection of such contention.

B. *The Specific Congressional Uniform Time Limits In Title VII Should Not Be Subordinated To The Diverse Grievance-Arbitration Procedure Standards In Labor Agreements Across The Nation.*

The Equal Employment Advisory Council believes there is a compelling urgency for this Court to stand by the jurisdictional time limits in the language of the Act. The Petitioners expand their argument before the Court and press beyond mere tolling. They further seek to shape the rule so that it would suspend the statutory time limits until the "terminal"

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incident, under Petitioner's proposal for tolling, the rights of each would accrue at different times. Congress should clearly speak out as to its intention before the Court should endeavor to go this far.

[18] Although Congress has given employees the right to bargain collectively, it equally has recognized their right to remain outside labor organizations. See the National Labor Relations Act, Section 7 (29 U.S.C. § 137).

point of grievance-arbitration procedures in collective bargaining agreements.[19]

Section 706(e) of the Act specifies a clear and definitive time frame for persons feeling aggrieved by employment discrimination to seek the assistance of the government agency created to afford them relief. It is a rule of limitation that is easily determined, capable of facile administration and contains a high degree of certainty. Such provision helps to achieve national uniformity. *Burnett* v. *New York Central RR Co.*, 380 U.S. 424, 434 (1964). The extension of Petitioner's tolling proposal, however, will do exactly the opposite. It introduces vagueness and uncertainty, lacks clear definitions and leaves the public interest in the hands of private persons who may be more preoccupied with other problems than the rights of aggrieved persons under Title VII.

No two collective bargaining agreements are alike. Each is the end product of a set of negotiations between two particular parties. As such, it is not unexpected that there are no commonality of provisions.[20] The same is true of the grievance and arbitration portion of these agreements. They vary widely in scope and detail depending upon the circum-

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[19] Petitioner's reference to an NLRB "policy" to this effect is wrong as the Board has never ruled on the question. This was confirmed by the present General Counsel John S. Irving in the transmittal letter to Petitioner's Counsel Schnapper, a copy of which was also filed with the Clerk of this court. It remains therefore an untested and adjudicated theory.

[20] Elkouri, "*How Arbitration Works,*" 3rd Ed. 1973 at p. 147.

stances between the parties.[21] Some contain very precise outlines of the various steps to be followed for the processing of a grievance while others are general.[22] It is obvious that there will be a total lack of uniformity if the time limits for filing a charge with the Commission are tied to these many different contractual grievance-arbitration procedures.

Not to be overlooked is the fact that there are contracts with no time limits for the filing of grievances. In such instances, there is nothing to prevent an aggrieved individual from having total control over the invocation of the statutory process. In essence, there would be *no* statute of limitations under Title VII in these instances.

Further, the fact that arbitration proceedings can take many months only serves to compound the situation. Each "terminal point" to start the running of the statute of limitations will depend upon the availability of the arbitrator, the number of hearings held, the time for filing of briefs and when the arbitrator renders a decision. Obviously, such a situation will confuse and not clarify matters for potential Title VII protectees. In the final analysis, practical

[21] This Court has had experience with several varieties. *Cf. Drake Bakeries, Inc.* v. *Local 50 American Bakery & Confectionary Workers*, 370 U.S. 254, 50 LRRM 2440 (1962); *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, 50 LRRM 2433 (1962); *Gateway Coal Company* v. *United Mineworkers of America, et al.*, 414 U.S. 368, 85 LRRM 2049 (1974); *Buffalo Forge* v. *Steelworkers*, 92 LRRM 3032 (1976).

[22] For a good capsule look at the range of this spectrum, see Sec. 51:21 *et seq.* of the updated labor relations service *Collective Bargaining Negotiations and Contracts*, published by the Bureau of National Affairs.

industrial relations considerations warrant rejection of the tolling proposal without in any way diminishing the full exercise of Title VII rights.

The doubts expressed about the grievance-arbitration machinery in *Alexander* cannot be lightly dismissed. They echo here when the proposal of the Petitioners is measured against other realities of the industrial scene. Less than two years ago this Court felt strongly enough about protecting the rights of individuals under Title VII that it altered the national labor policy on arbitration in favor of Title VII. Adoption of the tolling rule proposed by the Petitioners would literally constitute a repudiation of the rationale in *Alexander* v. *Gardner-Denver, supra.* Every argument urged by Petitioners here in favor of the arbitration process was advanced in *Alexander* by Respondent *against* the eventual outcome reached. The Court having spoken clearly there can be no doubt that grievance and arbitration procedures of labor contracts will not be superimposed by this Court upon the framework of Title VII. If that is what is desired, then Petitioners are in the wrong forum, for what they seek is an outright amendment of the statute of limitations in Section 706(e). But as this Court has pointed out repeatedly, the legislative power of government resides in the halls of Congress and not in this Court.

III. Tolling The Time Limits Under Title VII Will Increase The Amount Of Litigation Brought Under The Statute In The Federal Courts.

The practical problems commented on above will not linger long at the plant gates. The Comission will be faced with a bewildering maze of jurisdic-

tional determinations that will strain its already overburdened investigators even more. This situation will be exacerbated as such issues spill over into the District Courts when parties dispute the calculation of the period of tolling.

The Petitioners' further argument that the tolling period should be determined by the "terminal" point of the grievance-arbitration procedure will only serve to guarantee further confusion. The claim that a management decision under a labor contract is "tentative" and not final until exhaustion of the grievance machinery lacks judicial support and is at variance with the realities of industrial life. Further, a grievance is an appeal in every sense of the word from definitive management action *already* taken.[23]

The determination of when a terminal point has been reached in a grievance procedure is a natural wellspring for future litigation. It introduces elements of notice, knowledge, good faith efforts and several others that are traditional breeding grounds for contested matters. The best illustration can be found in this Court's recent experience in *McDonald* v. *Santa Fe Transportation Co.*, —— U.S. ——, 12 FEP Cases 1577 (1976) where employee McDonald contended he did not know that his "rights" under the machinery in the collective bargaining agreement

[23] Petitioner Guy's Counsel's reference on this point (Br. at p. 9) appears to be based upon a confusion with Civil Service Commission "adverse action" procedures which basically provide for review of proposed management action before it becomes final, this however, is totally inapposite to the private labor relations sector in which such an approach is foreign.

had expired until some three months after the statutory time limit in Title VII had run.[24]

It is easy to see that questions as to the proper determination of the tolling period will be constantly arising and lead to increasing litigation in the federal district courts.[25] The two examples cited in footnote 25 below refute the contention urged by Petitioners that tolling will reduce the amount of litigation. To the contrary, it only opens up new areas of dispute.

The Petitioner also urges the Court to recognize the denial of her grievance at the third step on November 18 as a refusal to rehire and another discriminatory occurrence setting off the basis for the filing of a new charge under the Act but one that

[24] Discharged on September 26, 1970, he had filed a grievance on October 2, 1970. It was denied at the third step on October 29, 1970 by the Teamsters Joint Southwest Area Grievance Committee. He was notified some five months later on April 3, 1971, that his discharge had been taken to arbitration and upheld. (See brief of Respondent Local No. 988 to this Court in Docket No. 75-260 at p. 2 and citations to appendix to petition therein.) Whether this "arbitration" was before an outside neutral or an industry "joint panel" is unknown. See *Hines* v. *Anchor Motor Freight*, 424 U.S. 554, 91 LRRM 2481 (1976). It only illustrates, however, further possible complications with the tolling rule proposed by Petitioners here.

[25] In *McDonald* v. *Sante Fe Transportation Co., supra*, the district court could not determine the duration of the tolling period without a hearing. In *Sanchez* v. *Trans World Airlines, Inc.* (C.A. 10), 499 F.2d 1107, 8 FEP Cases 627 (1974), the court of apeals said the record was unclear as to the date the proceedings were completed and remanded it to the trial court for determination on this issue. *Supra* at 499 F.2d 1110, 8 FEP Cases 628 (1973).

falls within the ninety day statute of limitations. This argument is based upon specious reasoning and should be rejected. Termination of employment puts at rest the employment discrimination because the person is no longer working for the Company. *Olson* v. *Rembrandt Printing Co.* (C.A. 8), 511 F.2d 1228, 10 FEP Cases 27 (1975). Commenting specifically on the contention that a denial of an aggrieved's request for reinstatement after discharge is a new act of discrimination, the Ninth Circuit said:

> "In this context a request for reinstatement is wholly different from a new application for employment—it seeks to redress the original termination." *Collins* v. *United Airlines*, 541 F. 2d 594, 597, 10 FEP Cases 728, 730 (1975).

No authority in point to support their novel argument is cited by the Petitioners' which is merely one more effort to evade the Congressional requirement written into the Act.

It is not in the best interests of aggrieved persons, or respondents, that there be vague and ill-defined jurisdictional requirements. The better trend is toward greater certainty as our structure of government becomes more complex. The Court has long recognized that it leans toward reducing technical paradoxes in the statutory scheme of Title VII. *Love* v. *Pullman*, 404 U.S. 522, 4 FEP Cases 150 (1972). The position urged by the *amicus* EEAC here to reject tolling enhances accessibility to the Commission and the courts by persons with *bona fide* grievances of employment discrimination and removes the encumbrances of procedures that contain hidden shoals for unwary laymen. Under Petitioner's proposal, individuals could become subject to a system of private

jurisprudence rather than the government fabric created by the elected representatives of the national legislature. No such delegation of legislative power is found in the history of the enactment of Title VII. This Court should not adopt such a construction, particularly in light of the pronouncement in *Alexander* that "Title VII does not speak expressly to the relationship between the federal courts and the grievance-arbitration machinery of collective bargaining agreements". *Supra.*

IV. The National Labor Policy Does Not Require Tolling As Necessary To Protect Rights Of Aggrieved Persons Under Title VII.

The rationale for the proposal that the statute of limitations in Section 706(e) be tolled if a grievance is filed under a collective bargaining agreement is untenable. One argument advanced is that victims of discrimination need more time to decide if they wish to assert their rights under the Act. The short answer is that Congress doubled the filing period and that six months is ample time for such a decision to be made.

A second ground urged for a rule of tolling is that by permitting access to the grievance and arbitration machinery of collective bargaining agreements, it will reduce the number of disputes ultimately going to suit. This is a naive suggestion in light of the obvious number of persons who invoke Title VII in the courts after having been told by arbitrators there are no grounds for believing they have been discriminated against.[26]

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[26] *E.g., Spann* v. *Joanna Western Mills* (C.A. 6) 446 F.2d 120, 3 FEP Cases 831 (1971); *EEOC* v. *Multiline Cans, Inc.*,

In the present case, Ms. Guy is here after an investigation by the Commission found her untimely claim to be otherwise non-meritorious. It is clear that many citizens likewise feeling aggrieved by allegedly discriminatory conduct, whether grounded in fact or not, will continue to seek relief in as many forums as this Court will allow.

The *amicus* EEAC suggests that the time has come for the Court in Title VII to adhere to its more conventional policy of demanding strict compliance with jurisdictional requirements written into the Act. This is not just because it is unfair to require employers to repeatedly bear the burden of defending the same charge, but also because it will help prevent overtaxing administrative and judicial resources. There is no gain to the public interest in having the same non-meritorious allegations heard by an arbitrator, the Commission, and the courts. Since the Congress has declined to interface the collective bargaining process with Title VII, the matter should rest there. The present structure of the Act in which a person has 180 days to file a charge with the Commission is adequate and represents the legislature's judgment on that point. Extending that period of limitation

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(D. Fla.), 7 FEP Cases 490 (1974); *Alexander v. Gardner-Denver*, on remand, 346 F. Supp. 1012, 8 FEP Cases 1153 (D. Colo. 1975); aff'd. 519 F.2d 503, 11 FEP Cases 149 (C.A. 10 1976). Cf. Professor Bernard Meltzer's recent observation before the National Academy of Arbitrators annual meeting that authorizing arbitrators to interpret and apply Title VII policy is "not likely to curb relitigation or in general to reduce the Title VII backlog." Labor Relations Reporter 92 LRR 69 (May 24, 1976).

under a rule of tolling, EEAC contends, is simply not a sound idea and should be rejected by this Court.

Ample precedent for such rejection is found in *Johnson* v. *Railway Express Agency, Inc., supra.* There the Court ruled that the Tennessee statute of limitations applicable to Section 1981 suits was not tolled by the timely filing of a charge with the Commission. The Court so found in the face of an argument that the result was unduly harsh to Title VII litigants. The Court's attitude there should be dispositive of Guy's request for tolling here. She had from November 18, 1971 until January 25, 1972, or more than 60 days after learning her grievance had been denied at the third step, in which to decide whether or not to go to the Commission. No explanation has been offered as to why she could not have filed within the statutory period and the price for relieving her of her neglect, is to plunge the statute into a procedural morass.

Petitioners' contend that permitting tolling will inure to the benefit of employers generally. Since they will be aware of the grievance, the argument goes, it will permit better preparation to defend charges if later filed with the Commission. This is not the case. Where, as here, the Petitioner does not claim discriminatory treatment as the ground for contesting the action taken by the Company under the labor contract, the employer is clearly not put on notice as to possible liability under Title VII.

Further, if tolling is permitted, an employer can go for months under the grievance-arbitration machinery and not be aware, until a charge is subse-

quently filed with the EEOC, that a violation of Title VII is being asserted against it.[27]

Under these circumstances, employers are seriously prejudiced, for the filing of a grievance does not necessarily provide adequate notice of potential Title VII claims.[28] On the other hand, absent tolling, when an employee is required to file a charge with the Commission, within the statutory time limits, an employer is properly made aware, since the Act requires the Commission to give written notice of the filing to a respondent within ten (10) days under Section 706(e).

It places no real burden on alleged discriminatees to require them to timely file with the Commission simply to protect their Title VII rights. Sanctioning a rule that avoids the clear and straight-forward requirement in the Act will not help such persons. It will only add to the confusion and probably result in more persons being foreclosed than will otherwise gain if tolling is approved. The *amicus* EEAC believes the interest of all concerned—employees, employers, the Commission, and the courts—will best

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[27] The IUE brief to this Court specifically outlines at pp. 33-4 several reasons why an aggrieved employee would want to conceal such basis for the grievance. The suggestion, however, that this would eliminate future charges before the Commission obviously is based entirely on the employer granting the relief sought. The IUE chooses to ignore that is is those persons who do not obtain such relief that then file with the EEOC.

[28] Employers thus may not take necessary steps to preserve vital evidence needed to defend against the grounds in the statute.

be served by a decision that stabilizes the procedures under Title VII.

The national policy in favor of ending discrimination does not need a rule of tolling which will apply to virtually one in four employees in the nation's work force. It does need, on the other hand, greater certainty of procedure and substantially less litigation. The entire statutory scheme should not be restructured just to alleviate the problem caused by Guy's unexcused failure to comply with the specific statute of limitations in Title VII.

CONCLUSION

For the reasons stated above, the *amicus curiae* urges the Court to reject Petitioners' contentions and to affirm the decision of the Court of Appeals for the Sixth Circuit below.

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SUPPLEMENTAL APPENDIX [1]

DEPARTMENT OF JUSTICE
Washington

Feb. 14, 1972

Honorable Peter H. Dominick
United States Senate
Washington, D. C. 20510

Dear Senator Dominick:

You have asked for my views on the relative merits of the several proposals now pending in the Senate for providing EEOC with Title VII enforcement powers. I have again examined S. 2515, the Equal Employment Opportunities Enforcement Act, and have given particular attention to Amendments 871 and 878 to the Act.

Before discussing those amendments, I should like to raise two matters of concern to us not specifically raised by either amendment. This Department and Administration oppose the present provisions of S. 2515 (Section 5) which contemplate abolition of the Attorney General's authority to bring pattern or practice lawsuits. We believe that these suits have been the most successful enforcement tool of the Federal government to date; that the Justice Department

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[1] This letter was part of the record in *EEOC* v. *Christianburg Garment Co.*, 376 F.Supp. 1067, 7 FEP Cases 1233 (W.D. Va. 1974). The Court there ascribed a similar meaning to the limited impact of the amendment to Section 14 of the 1972 amendment. The EEOC did not appeal the decision of the District Court on this construction.

has the resources and the daily relationship with the courts which cannot be adequately replaced in cases of general public importance, and that removal of that tool would constitute a step backwards in the efforts to enforce the equal employment opportunities laws. Accordingly, regardless of the Senate's choice between Amendments 871 and 878, I would hope that you would support an effort to delete the present Section 5 from S. 2515.

Secondly, the present provisions of S. 2515 (Se. 13) contemplate that the new enforcement provisions would only apply to charges filed after its effective date. We see no reason why the many thousands of persons who have filed charges which are still being processed and who have waited as long as 18 months to two years for resolution of them should not have the benefit of the new enforcement authority.

Amendment 878 (the Williams-Javits Amendment) carries foreward the main features of S. 2515 as reported by the Senate Labor Committee. Under that Amendment, EEOC will have authority to issue orders, which may become enforceable in the courts after opportunity for judicial review. Although the words "cease and desist orders" in the original bill have been deleted and the term "recommendation" substituted therefore, this change does not appear to be a substantial one, since under either version the EEOC position becomes an enforceable order unless modified by the court upon review. Like the committee bill, the Williams-Javits Amendment calls for judicial review of the EEOC order on the administrative record. Sec. 706(k)(1), pp. 6 & 7 of the Amendment. Like the Committee bill, the Williams-Javits Amendment makes the findings of EEOC "conclu-

sive" on the courts if supported by "substantial evidence on the record as a whole" (Sec. 706(k)(2), p. 7 of the Amendment).

Although the Williams-Javits Amendment provides for filing of the administrative complaint with the district court, we do not perceive any substantial change resulting from that novel procedure. Also, the Williams-Javits Amendment provides for an interlocutory appeal to the district court on any "controlling question of law" if it finds that such review "would materially advance the ultimate termination of the litigation." It is doubtful that this addition is a significant one, since controlling issues of law were judicially reviewable under S. 2515, and this Department's experience under the analogous provisions for interlocutory appeal from district court decisions (28 U.S.C. 1292(b)) indicates that such appeals are only useful on rare occasions.

The one material change which the Williams-Javits Amendment would make in S. 2515 is to transfer judicial review from the courts of appeals to the district court. This change adds another layer of review to the already lengthy process of charge, investigation, cause finding, administrative complaint, hearing before hearing examiner, review before the Commission and review in the Court of Appeals.

Amendment 871 (the Dominick Amendment) on the other hand, authorizes the EEOC to proceed in the appropriate United States District Court to secure relief from any employment practice it deems unlawful. In such proceedings, the evidence would be heard by the District Judge and the facts found by him. In addition, under the Dominick Amend-

ment, those judicial proceedings would be expedited and the General Counsel could require the convening of a three-judge court with direct review in the Supreme Court upon a filing of a certificate of general public importance.

As you know, when I testified before the subcommittee on Labor of the Senate Committee on Labor and Public Welfare in October last year on behalf of the Department of Justice and the Administration, I again expressed our view that the granting of authority to the Equal Employment Opportunity Commission to bring judicial proceedings is a better means of enforcing Title VII than granting that Commission administrative enforcement powers. We will adhere to that view.

In my testimony before the Senate Labor Committee I set forth four grounds for our view that judicial enforcement is preferable to administrative proceedings. (Hearings pp. 150-151.) One of those was applicable only to governmental employers and was accepted by that Committee. The other three bases for our view may be summarized as follows: (1) Federal district judges hold court throughout the country and enjoy a confidence and respect in their communities which cannot be matched by administrative officers; and their authority to issue enforceable orders enables them to resolve cases speedily; (2) because of the sensitive nature of the issues to be resolved and the fact that the larger cases involve the rights and expectations of substantial numbers of people, it is inappropriate to leave the critical factual determinations and formulations of relief to hearing examiners and Commissioners sitting in Washington; and (3) the fact that Federal courts

resolve the factual and legal issues in equal opportunity cases in the areas of voting, housing, and education make them a particularly appropriate forum for resolving the same kinds of issues in employment discrimination cases. In addition, I pointed out that there is a definite, although hard to measure, advantage in having the person who has heard the evidence be responsible for fashioning the relief which he must then enforce (Hearings, p. 156).

In our opinion, each of these considerations is still applicable, and each of them counsels in favor of court enforcement approach of Amendment 871 (the Dominick Amendment) rather than the administrative fact-finding approach of Amendment 878 (the Williams-Javits Amendment). In short, we support court enforcement and Amendment 871, rather than administrative enforcement, as the best method of securing widespread compliance with Title VII of the Civil Rights Act of 1964.

Sincerely,

/s/ David L. Norman
DAVID L. NORMAN
Assistant Attorney General
Civil Rights Division

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